REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Case 12 of 2006

REPUBLIC …….PROSECUTOR

VERSUS

MOHAMMED IDDI OMAR …….……ACCUSED

RULING

This is a murder trial with the aid of assessors which commenced on 28th June 2006 when the accused person entered a plea of not guilty followed on 25th July 2006 with the selection of assessors and finally the prosecution began to call witnesses on 8th September, 2006 and indeed called two witnesses – before the trial was adjourned to 9th October, 2006. On that day after the 3rd witness had been cross examined and re-examined, the court sought, as is the normal procedure, from the assessors if they had questions for the witness. Learned Counsel, Dr. John Khaminwa, for the accused person, at this stage raised an objection regarding the involvement of assessors in the trial. After giving the history of the emergence of trial with assessors in Kenya, counsel submitted that Sections 263, 269, 270, 271, 273, 297, 298, 299 and 322 of the Criminal Procedure Code, dealing with the role of assessors in a criminal trial, their liability, exemption from service, attendance at the trial and selection, are in conflict with the Constitution. That while the Constitution provides for the participation of all those involved in criminal trial, namely, the judge, magistrate, prosecutor, defence counsel and court interpreter, there is no similar provision with regard to the assessors, yet they are allowed to play a critical role in the trial. They ask questions and even give their opinion. In contrast with the other jurisdictions that have institutions similar to assessors or the jury system, the same are entrenched in their Constitutions, counsel submitted.

It was also submitted that the participation of assessors interferes with Section 77 of the Constitution as it denies the accused person a fair hearing by an independent and impartial court.

Learned Principal State Counsel sought and was granted time to respond to the foregoing submissions. When the hearing resumed he submitted that the Constitution is the supreme law and any other law which is inconsistent with it, is to that extent, void. He argued that it was incumbent upon the applicant to demonstrate how the Constitution has been violated by the participation of the assessors to his detriment.

That while the law makes it mandatory that trials in the High Court must be with the aid of assessors, the same law provides that the judge shall not be bound by their opinion.

Finally counsel invited the court to examine the mischief intended by the requirement of the assessors' participation in trials in the High Court.

I have given due consideration to these submission.

The issue raised can only be interpreted to mean that the applicant is complaining that he is not having a fair trial as guaranteed under the Constitution by reason of the participation of 'strangers" who are taking notes, asking questions and just before judgment will be giving their opinion as to whether or not he is guilty of murder. Consequently he is asking the court to declare that the participation of the assessors in his trial is void as they are not a creation of the Constitution.

Such an application can only be made under Rule 23 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the Individual) High Court Practice and Procedure Rules, 2006, which stipulates that;

"**Where a Constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same".**

Has the participation of the assessors in this trial violated the applicant's fundamental rights and freedom as guaranteed under the Constitution?

The only reason advanced for the argument that the participation of the assessors in the trials in the High Court violates the Constitution is the fact that while the Constitution provides for the judge, prosecutor, defence counsel, witnesses and interpreters there is no provision at all for the assessors in criminal trial in the High Court. Who are assessors?. The answer to this question should lead us to discover the role played by them and whether it is unconstitutional. The literal meaning of the word assessors, according to the Concise Oxford English Dictionary, 10th Edn. is a person who assesses; a specialist who is called upon to advice by a judge or committee of inquiry. In English Law, for instance, assessors imply expertise. For this reason the English Court of Criminal Appeal has power to appoint any persons with special expert knowledge to act as assessors where it appears to the court that such special knowledge is required.

Following the adoption of the Indian Criminal Procedure Code a number of Commonwealth jurisdiction followed the practice of trying certain cases with the assistance of assessors.

In Kenya, for example, Section 87 of the Civil Procedure Act requires that where, before any court a question arises as to the law or custom of any tribe, caste or community, the court may try the question with the aid of one or more competent assessors. Similarly in any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the court either in its original or appellate jurisdiction may summon assessors competent in this field to assist. Further Section 65 of the Civil Procedure Act provides that the Chief Kadhi or two other Kadhis, as assessors shall sit with the judge on matters of appeal from the Kadhis court, to bring out issues of Islamic law which the judge may not be conversant with.

So, are assessors in criminal trial expected to be experts in any aspect of the trial? The actual nature and extent of the role and function of the assessor in criminal trial is not clearly defined. But clearly they are not experts in any way in a criminal trial. They are infact common people. This is amply demonstrated by those who are exempted (disqualified) from serving as assessors. I must hasten to explain that at some stage in their history assessors were seen and indeed played a role of experts in the trial. That was in the pre-independence period. An old Indian case summarizes why assessors were seen as experts.

Bhashyman Ayyangar, J in the case of **King Emperor v Tirumal Reddi,** (1901) 1LR 24 stated that;

"……**assessors are analogous to expert witnesses, and in principle the opinion of an assessor is substantially on the same footing as the opinion evidence of expert witness……Thus it will be seen that provision was made by the legislature for Europeans administering justice in a foreign land and therefore deficient in their knowledge of the customs and habits of the parties and witnesses appearing before them, and also deficient in judging of their demeanour in the witness box, having the benefit of the opinion of two or more respectable natives of the land as assessors possessing such knowledge …….and judgment upon the whole case tried before a court of session or any portion of such a case is, on principle on the same footing on the opinion evidence of a person skilled in foreign law or art".**

This was the rationale that informed the need to have the assessors participate in trials presided by foreign judicial officers. Indeed the sentiments expressed in the **Tirumal Reddi** case (Supra) were adopted in the Kenya case of **R. V Mutwiwa** (1935) 2 EACA 66 by the Court of Appeal for Eastern Africa.

Those were, as I have stated the reasons, in the pre-independence period. It was a way of assuring the natives that their customs and traditions were respected.

The decision of Privy Council in the Case of **Mahlikililili Dhalamini and Others v R** (1942) A.C 589 emphasizes this point. It held;

"It must further be remembered that the provisions for giving the judge……the assistance of a native assessor cannot be regarded solely from the point of view of aid given to the judge. It operates, and no doubt it is intended to operate, as a safeguard to natives accused of crime and as a guarantee to the native population that their own customs and habits of life are not misunderstood".

This concept has been developed and today assessors are no longer regarded as experts in customary law because such laws have no application in a criminal trial. Today the ideological justification underlying the involvement of assessors emphasizes that they are representatives of the broader community charged with injecting an element of lay values and common sense into the criminal justice process. But the extent to which they can be considered representatives is equally debatable.

The truth of the matter is that the role and function of assessors have waned over the years due to one single fact; their decision does not bind the trial judge. Their participation has, no doubt caused delay, and today, it has become financially costly.

If the institution of assessors does not add value to the ultimate decision of the judge, if it is costly and if it has contributed to the delay in murder trials one might well wonder why the assessor system continues to survive.

Many countries, Kenya included, which inherited this system have either removed it from their statutes or are in the process of doing so, following the realization, albeit too late, that the social – economic conditions under which this law was based ceased to exist. But, in Kenya, before that stage is reached it is mandatory that all trials in the High Court must be with the aid of assessors, a matter the Court of Appeal has religiously and jealously superintended.

I turn now to the main question in this application, namely whether any of the applicant's rights have been or is being contravened by the participation of the assessors in his trial.

First Section 3 of the Constitution declares that;

"This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to Section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".

This provision, apart from declaring the supremacy of the Constitution also recognizes the fact that it does not provide for every situation. That situations not provided for are contained or may be contained in other laws. The cardinal rule is that those other laws must conform to the Constitution otherwise they are null and void.

The Constitution does not provide for the participation of assessors in criminal trials in the High Court. Yet sections 263, 269, 270, 271, 272, 297, 298, 299 and 322 of the Criminal Procedure Code makes it clear that any trial conducted without the assistance of assessors is a nullity. Does that requirement make the above provisions of the Criminal Procedure Code void for being inconsistent with the Constitution?

The history set out earlier in this ruling clearly shows that the rationale for the introduction of trial with assessors was intended for the benefit of the suspect, apart from providing for public participation in the

criminal justice. It was meant to entrench fairness in the trial of a criminal suspect. The court in **R v Gusambizi Wesonga** (1948) 15 EACA 65 observed that in the exercise of any function of assessors the court is always to apply the test of what is fair to an accused person, keeping in mind the principles of natural justice and to ensure that there is no failure of justice. This is fortified by the procedure adopted in selecting the assessors and their ultimate role in the trial. On inception it was noble notion that assessors should come from the same place as the accused.

This, of course, has long been dispensed with. The accused person has a right to object to participation of any assessor who either knows the facts of the case or is related to the deceased or the accused himself or who he believes will be biased. See **Ndirangu v R** (1959) EA 875, where it was held that if injustice will be occasioned by an assessor sitting with the judge, an objection can be taken on that ground and the court must disqualify the assessor concerned. Second safe guard is that the assessors can ask only specific questions and only with the leave of the court. Their questions are normally limited to clarification of any matter not understood by them. They do not cross-examination.

Thirdly it has been held in numerous decisions that although the Criminal Procedure Code does not impose a mandatory duty on the High Court to sum up to the assessors, it is now settled that failure to sum up is fatal. I have already stated that literacy is not one of the qualifications of assessors. They are not versed in law and due to the long and technical procedure, assessors more often become inattentive, hence the need to sum up both the law and fact.

Fourth ground is that after the assessors have stated their opinion, the judge must give judgment, but in doing so he is not bound to conform to their opinions.

However, in all cases where the trial judge comes to a contrary finding on the facts to the opinions unanimously shared by the assessors, the judge must state in his judgment the reasons for disagreeing with them.

To me these are matters that go to ensure that the accused is afforded a fair trial in accordance with Section 77 of the Constitution. The Constitution in Section 60 donates to the High Court both original and unlimited jurisdiction in civil and criminal cases. It reads;

" **60. (1) There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on or by this Constitution or any other law"** (emphasis supplied).

Reference to any other law includes the Criminal Procedure Code, which confers on the High Court jurisdiction to hear trials in criminal cases with the aid of assessors.

Before I conclude I wish to emphasize that the Criminal Procedure Code weakens the institution of assessors by making them mere spectators by providing, in compulsory words, that all the trials in the High Court shall be by the aid of assessors and at the same time, and in similar mandatory language that their opinions are not binding. It makes the institution of assessors a mere sham. Secondly, apart from resource implication, which has in the recent past seen a near industrial unrest in the Judiciary by the assessors demanding their pay in public with threats of go-slow and strikes, most of the assessors, as I have already observed have difficulty in comprehending the summing up due to their level of literacy.

This is probably what led Thacker, J to observe, in rather very strong and unkind words that;

"**Each of the assessors returns an opinion of not guilty and I suspect that their opinions are based not upon the evidence they have heard but upon inter tribal prejudice ……..I deplore their opinions which are either as a result of stupidity or pervasiveness".**

See **R v Ogende s/o Omungi** (1941) 19 KLR 25. Finally on this point, I believe the institution of assessors served its purpose when it was introduced in Kenya in the post-colonial era. They today have no useful role in the criminal justice system due to strict statutory provisions regarding the standard of proof

and criminal liability. I am of course aware of a pending Bill to repeal the relevant provisions of the Criminal Procedure Code.

Having said the foregoing I have to state that in the instant application I have not been persuaded that any of the rights of the applicant guaranteed by the Constitution has been violated. The mere absence of the provision in the Constitution of the assessors and their function does not, in my view, render the relevant provisions of the Criminal Procedure Code void for being inconsistent with the Constitution. The role of the assessors may be superfluous in the present day but they are not inconsistent with the Constitution.

For this reason the objection is overruled.

Dated and delivered at Malindi this 23rd day of November 2006

W. OUKO

J U D G E